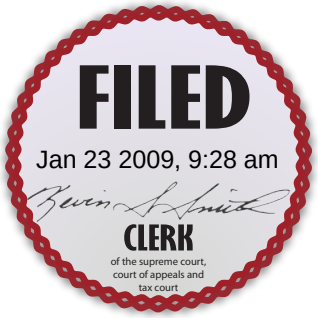

ATTORNEY FOR APPELLANT:

MARK D. GERTH
Kightlinger & Gray, LLP
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

KEVIN C. SCHIFERL
JULIA BLACKWELL GELINAS
LUCY R. DOLLENS
Frost Brown Todd, LLC
Indianapolis, Indiana

JOHN C. BONNIE
Weinberg Wheeler Hudgins Gunn & Dial, LLC
Atlanta, Georgia

IN THE COURT OF APPEALS OF INDIANA

DUECO, INC.,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 73A01-0809-CV-436
	)	
TEREX-TELELECT, INC.,	)	
	)	
Appellee/Cross-Defendant,	)	

APPEAL FROM THE SHELBY CIRCUIT COURT
The Honorable, Charles D. O'Connor Judge
Cause No. 73C01-0505-CT-12

January 23, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Dueco, Inc. appeals the trial court's grant of a motion for summary judgment filed by Terex-Telelect, Inc. ("Terex"). We affirm.

Issue

Dueco raises one issue for our review: whether the trial court properly granted summary judgment in favor of Terex on the issue of indemnity.

Facts

Anthony Wade was seriously injured on August 25, 1997, when he fell while getting out of the aerial passenger bucket of a utility truck sold to his employer by Dueco. Dueco equipped the truck with the aerial bucket and its component parts, which Terex manufactured. After installing the aerial bucket onto the truck, Dueco installed various metal steps to access it. Terex did not manufacture the steps. Wade filed a complaint against multiple parties alleging that the design, manufacture, distribution, sale, and installation of the aerial bucket were defective and unreasonably dangerous and that Dueco and Terex were negligent.

Prior to this accident and lawsuit, Dueco and Terex entered into a Distribution Agreement ("the Agreement"). The indemnification portion of the Agreement provided:

> [Terex] agrees to indemnify and hold [Dueco] harmless from and against all claims, expenses or liabilities of any kind or

> nature whatsoever, including reasonable attorneys' fees, incurred by [Dueco], directly or indirectly, with respect to the following:
>
> ####
>
> (2) Any and all claims for damage or injury to person or property alleged to have been caused by [Terex's] negligence or a defect in a Product or Parts manufactured or sold by [Terex].

App. p. 55. The insurance portion of the Agreement provided:

> b. [Dueco] shall at all times during the term of this Agreement maintain comprehensive general liability coverage of at least $1,000,000, which will not be cancelled or reduced without prior notice to [Terex], and [Dueco] shall provide [Terex] with certificates of insurance evidencing compliance with the provisions of this paragraph.
>
> c. [Terex] shall at all times during the term of this Agreement maintain comprehensive general liability and product liability insurance in an amount of not less than $2,500,000, which will not be canceled or reduced without prior notice to [Deuco] and [Terex] shall provide [Dueco] with a certificate of insurance evidencing compliance with the provisions of this paragraph. If a vendor's endorsement becomes generally available to [Terex] it will be provided to [Dueco].

Id. at 56.

On November 22, 1999, Dueco filed a four-count cross-claim against Terex for indemnification for any liability Dueco may have to Wade. Count I was based on contractual indemnity pursuant to the provisions of the Agreement. Count II was based on common law indemnity. Count III was based on breach of contract to insure Dueco. Count IV was based on breach of express warranty. Dueco settled with Wade in March

of 2006. Following the settlement, Dueco continued to pursue its cross-claims against Terex, seeking to recover amounts it paid defending and settling Wade's claim.

On April 10, 2007, Terex filed a motion for summary judgment on Dueco's cross-claims. On June 25, 2007, Dueco filed a cross-motion for summary judgment. The trial court held a hearing on the cross motions on September 13, 2007. It entered summary judgment for Terex on all counts on August 4, 2008. This appeal followed. Dueco limits its appeal to the trial court's grant of summary judgment in favor of Terex only on count I regarding contractual indemnity.

Analysis

Dueco contends that the trial court erred in granting summary judgment for Terex on the issue of contractual indemnification. Dueco argues that it is entitled to total indemnity for the Wade litigation under the terms of the Agreement. Terex counters that Dueco is not entitled to indemnity for Dueco's own negligence under Wisconsin law.

Summary judgment is appropriate only where the evidence shows there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Bushong v. Williamson, 790 N.E.2d 467, 473 (Ind. 2003) (citing Ind. Trial Rule 56(C)). "All facts and reasonable inferences drawn from those facts are construed in favor of the non-moving party." Id. "We will affirm a grant of summary judgment if it can be sustained on any theory or basis in the record, even if the trial court has entered findings and conclusions in support of its ruling." Arnett v. Cincinnati Ins. Co., 864 N.E.2d 366, 368-69 (Ind. Ct. App. 2007), trans. denied. The fact that the parties filed cross-motions for summary judgment does not alter our standard of review. City of

Crown Point v. Misty Woods Properties, LLC, 864 N.E.2d 1069, 1075 (Ind. Ct. App. 2007).

Dueco and Terex's Agreement provides the basis for any contractual indemnity. The trial court entered summary judgment based on its construction of the contract terms. This contract interpretation is a pure question of law, which we review de novo. Millsaps v. Ohio Valley Heartcare, Inc., 863 N.E.2d 1265, 1270 (Ind. Ct. App. 2007), trans. denied. The Agreement provides that it will be governed by the law of Wisconsin. When a contract provision specifies that the contract is to be governed by the law of another state, the substantive law of that state applies. See Simon Property Group L.P. v. Action Enterprises, Inc., 827 N.E.2d 1235, 1237 n.1 (Ind. Ct. App. 2005), trans. denied. The parties do not dispute the application of Wisconsin law and set out Wisconsin cases to guide our review of this issue.

The trial court held that "the indemnification provision contains no reference of any kind that Terex would provide indemnification to Dueco for Dueco's own negligence or fault." App. p. 20. Dueco faces allegations of direct negligence and allegations of direct negligence are asserted by Wade against third parties. Terex asserts: "As a matter of law, Dueco's liability was limited to its own negligent conduct. It faces no liability for the alleged conduct of Terex." Appellee's Br. p. 11. Dueco does not directly refute this claim, but only continues to assert that it is entitled indemnity because of the "parties' intent that Terex would indemnify Dueco for claims for injuries caused by a Terex product." Appellant's Reply Br. p. 4. Neither party suggests that Dueco would be entitled to some sort of partial indemnification; rather, the arguments of the parties focus

on whether Wisconsin law would allow indemnification for one's own negligence based on the terms of the Agreement.

The Wisconsin Court of Appeals recently summarized Wisconsin law regarding indemnity provisions for one's own negligence:

> Generally, contracts providing for indemnification in the case of the indemnitee's negligence are considered valid and not contrary to public policy. Yet, the general rule accepted in this state and elsewhere is that an indemnification agreement will not be construed to cover an indemnitee for his own negligent acts absent a specific and express statement in the agreement to that effect. That is, indemnity agreements will be liberally construed when dealing with liability based on the negligence of the indemnitor, but strictly construed when the indemnitee seeks to be indemnified for his own negligence.

Mikula v. Miller Brewing Co., 701 N.W.2d 613, 624-25 (Wisc. Ct. App. 2005) (internal citations and quotations omitted), rev. denied. The Miller court noted that the Wisconsin Supreme Court had carved out a narrow exception that "even in the absence of clear and unequivocal language, the agreement to purchase liability insurance in addition to the provision holding the indemnitee harmless from any liability evidenced the clear intent—that the contract intended to provide for the indemnification of the indemnitee from the effects of his own negligence." Id. at 625 (citing Hastreiter v. Karau Bldgs. Inc., 205 N.W.2d 162, 163 (Wis. 1973)). The Wisconsin Supreme Court also has recognized, "a strict construction of an indemnification agreement cannot be used to defeat the clear intent of the parties." Spivey v. Great Atlantic & Pacific Tea Co., 255 N.W.2d 469, 472 (Wis. 1977).

In both Herchelroth v. Mahar, 153 N.W.2d 6, 8 (Wis. 1967), and Hastreiter v. Karau Bldgs. Inc., 205 N.W.2d 162, 163 (Wis. 1973), the Wisconsin Supreme Court held that indemnity agreements were intended to protect the indemnitee from his own negligence despite lacking an express statement of the same. The indemnity language in Herchelroth provided: "The LESSOR agrees to secure and pay for property damage and public liability insurance on the leased equipment and to save the LESSEE harmless from any damage thereby during the duration of this agreement." Herchelroth, 153 N.W.2d at 8. The court held that with such language the parties clearly "intended that the insurance appellant [Lessor] was to secure and pay for was to protect the respondent [Lessee] from the consequences of his own negligence" and if not, then the remainder of the sentence "would be meaningless and inoperative." Id. at 10.

Relying on Herchelroth, the Wisconsin Supreme Court in Hastreiter again recognized the exception in the treatment of indemnification clauses for one's own negligence. The indemnity provision in Hastreiter provided: "The Lessee agrees to carry and pay for public liability insurance and to hold the Lessor harmless from any liability arising out of the occupance of said leased premises by the Lessee." Hastreiter, 205 N.W.2d at 163. The Wisconsin Supreme Court reasoned that the "public liability insurance clause is intended to protect the landlord from the effects of his own negligence" and to construe the indemnification otherwise would "make the hold harmless clause surplusage." Id. at 163-64.

The indemnity provision at issue in Mikula provided:

> The Sub-Contractor [J.F. Cook] shall indemnify and save harmless the Owner [Miller], the Architect, the Contractor [Selzer-Ornst] and their respective agents from any and all liability, payments and expenses of any nature for injury or death to any person, or persons, or for damage to any property, caused ~~or alleged to have been caused~~ by the Sub-Contractor, or incidental to the execution of work under this contract by the Sub-Contractor, his agents or employees; and the Sub-Contractor shall maintain from the beginning until the completion of his work policies of insurance satisfactory to the Contractor, covering the liabilities above mentioned, such as employers' liability insurance, public insurance, contingent insurance, etc.

Mikula, 701 N.W.2d at 616 (strikethrough in original).

The Mikula court reviewed the language of the indemnity provision at issue and concluded that in conjunction with the agreement to provide insurance it evidenced Cook's intent to indemnify Miller for Miller's own negligence. The Wisconsin Court of Appeals reasoned:

> Similarly, here, when the two provisions are taken together, J.F. Cook's agreement to purchase additional insurance and to
>
> > indemnify and save harmless the Owner [Miller] ... from any and all liability, payments and expenses of any nature for injury or death to any person, or persons, or for damage to any property, caused by the Sub-Contractor, or incidental to the execution of work under this contract by the Sub-Contractor, his agents or employees[,]
>
> evidences J.F. Cook's intent to indemnify and hold Miller harmless even though Miller may be negligent. An agreement to purchase insurance indicates an intention to affect the burden of covering the cost of liability that may arise, and considered in combination with an agreement to "indemnify and save harmless" a party from "any and all liability" for injury or death or "for damage to any property"

> "caused by the Subcontractor" or "incidental to the execution of work," evidences a clear intent to indemnify the party for all liability, including that resulting from the indemnitee's own alleged negligence. The contract evinces no other purpose for the inclusion of both agreements.

Id.

Dueco relies on this language to support the proposition that Terex's agreement to maintain insurance evidences an intent to indemnify Dueco for Dueco's own negligence. As Terex points out, however, the indemnity provision in Mikula and the indemnity provisions in Hastreiter and Herchelroth are very different than the Terex-Dueco indemnity provision. The language in the Agreement here is much more narrow and specifically indemnifies Dueco only for "damage or injury . . . alleged to have been caused by [Terex's] negligence or a defect in a Product or Part manufactured or sold by [Terex]." App. p. 55. The indemnity language and combined insurance provision in Herchelroth is much broader. "The LESSOR agrees to secure and pay for property damage and public liability insurance on the leased equipment and to save the LESSEE harmless from any damage thereby during the duration of this agreement." Herchelroth, 153 N.W.2d at 8. The indemnity provision in Hastreiter was also quite broad: "The Lessee agrees to carry and pay for public liability insurance and to hold the Lessor harmless from any liability arising out of the occupance of said leased premises by the Lessee." Hastreiter, 205 N.W.2d at 163.

Also, in all three of the other indemnity provisions, a clause for maintaining insurance is within the same sentence. The indemnity provision between Terex and Dueco makes no reference to the procurement of insurance. Those provisions are in

another part of the Agreement. Unlike the insurance provisions in Mikula, Hastreiter, and Herchelroth, which mandate that only the indemnitor purchase insurance, the provision here requires both indemnitee and indemnitor purchase insurance. Dueco's reliance on these cases is misplaced.

Dueco points out that the insurance provision requires Terex to maintain comprehensive general liability and product liability insurance while only requiring Dueco to maintain product liability insurance. Dueco contends that this directive is indicative of the parties' intent that Terex would indemnify Dueco and pass on any obligations to Terex's product liability insurer. This reasoning is faulty as the Agreement mandated that both parties procure liability insurance—the Agreement did not single out Terex. Dueco also maintains that the trial court erred by not taking the product liability insurance provisions into account when deciding indemnity issue on summary judgment. We disagree. The trial court acknowledged the insurance procurement provisions in issuing its order.

Wisconsin law is clear in requiring that to indemnify for one's own negligence requires explicit expression of such an intention. The Wisconsin Supreme Court has held: "There must be an express provision in the agreement to indemnify the indemnitee for liability occasioned by its own negligence. Such an obligation will not be found by implication." Webster v. Klug and Smith, 260 N.W.2d 686, 690 (Wis. 1978). The indemnification provision here does not contain such an intention and Dueco cannot be indemnified for its own negligence.

Conclusion

As a matter of Wisconsin law, the Agreement did not provide Dueco with indemnity for its own negligence. The trial court's grant of summary judgment in favor of Terex on the issue is correct. We affirm.

Affirmed.

BAILEY, J., and MATHIAS, J., concur.